No. 16000

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RAYMOND JOHN WAGNER, ANTHONY JOSEPH CAMBIANO and DONALD VANDERGRIFT,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

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I.

Statement of the Case.

Appellee has no substantial difference with appellant's Statement of the Facts. One inadvertent error is noted on page 12, line 14, of Appellant's Brief where with reference to the witness Hunt it is stated, he, Hunt, had been sitting in the car from 10 to 11 o'clock. Hunt had testified that his car had been there since 10 or 11 o'clock, not that he had been sitting in it all that time.

The Robbery, Briefly Summarized.

On the afternoon of December 19, 1955, at about the hour of 2:30 P.M. Assistant Postmaster Bonner and Postmaster Martin left the Post Office at Bellflower to deposit postal funds and checks in a bank at Bellflower, California [R. 104]. They proceeded from the Post

Office in a Pontiac station wagon driven by Postmaster Martin. Martin was armed [R. 105]. They parked the station wagon in a parking lot to the rear of the bank. Immediately upon stopping the auto and when they, Bonner and Martin, started to get out of the car they were accosted; "a man accosted Martin with a gun . . ." [R. 106-107]. Bonner testified that he could not identify the man who accosted Martin with a gun [R. 107]. Postmaster Martin identified such person as the Appellant Vandergrift [R. 254-255]. Martin testified that this person, Vandergrift, ". . . approached on my side and stuck a gun in my side and demanded my gun" [R. 254]. That this person, Vandergrift, was also reaching in on the right side of Martin's coat trying to get his, Martin's, gun [R. 255]. "So (Martin) I reached into the left to give him my gun, and at that time he pushed the gun into my ribs and told me to keep my hand out if I didn't want to get shot" [R. 255]. Martin testified that he was apprehensive of his life and that he felt his assailant meant business [R. 255]. That his shirt had a rip in it where the gun had jammed into his ribs [R. 256].

Bonner testified that the man on his side of the auto also had a gun [R. 107]. That this person demanded the money. This person, Bonner identified as the defendant Wagner [R. 108]. Bonner testified that he was certainly apprehensive of his life and was in fear when the gun was pointed at him and that he believed the men meant business [R. 109]. Bonner testified that the "man," "Wagner," took the money, that the two of them went to the rear of their car and then later came in front of their car, crossed the street and got in the get-away car that was double parked across the street on Maple Street, headed east [R. 109]. This car was described as a dirty-colored Oldsmobile. Assistant Post-

master Bonner stated he saw the driver of the get-away car very clearly, whom he identified as the appellant Cambiano [R. 110]. Postmaster Martin likewise identified Cambiano as the driver of the get-away car [R. 259-260].

Witness Bonner stated that there was a "7-up" truck double parked on the street at the time they (he and Martin) went into the parking lot [R. 149]. That he later talked to the driver of this truck [R. 150]. That the "7-up" man gave to him, Bonner, the license number of the get-away car [R. 178].

The Witness Robert Hunt stated that he was an insurance agent. That on December 19, 1955, he had parked his automobile on Maple Street [R. 226]. This car was parked on the opposite side of the street from Mr. Hunt's office. That he had gone to his car that afternoon and attempted to start his car when a man with a money sack or a brown canvas bag in one hand and a gun in the other appeared to the right of his car [R. 227]. Witness Hunt identified this person as the defendant Vandergrift [R. 228]. That this person was close to him, about four or five feet—that he had blue eyes [R. 229]. Hunt described the get-away car as a "'50, '51, oxidized, badly oxidized Oldsmobile, four-door sedan" [R. 229]. Hunt observed the driver of this car and identified him as appellant Cambiano [R. 230]. Upon cross-examination, he again identified Canbiano and gave a description of him as he remembered him [R. 242]. The witness Hunt conceded that his identification of Vandergrift was "doubtful" [R. 238]. Hunt made no attempt to identify appellant Wagner; he testified: "Another man crossed behind the first man, which I did not get a good look at" [R. 230].

Postmaster Martin identified Vandergrift as the person who approached his side of the car ". . . and stuck a gun in my side and demanded my gun" [R. 254-255]. Martin also identified Wagner as the person he observed on the opposite side of the car. ". . . I glanced over to my Assistant Postmaster and I noticed that another man was over there with a gun at his head" [R. 257]. That this person did not then have a mask on [R. 257]. Witness Bonner had testified that the mask over a part of Wagner's face had slipped down [R. 140]. Witness Martin also identified Cambiano as the driver of the car that the robbers used to make their get-away [R. 260].

Identification Summarized.

Assistant Postmaster Bonner identified two of the defendants, *i.e.,* Wagner [R. 108] and Cambiano [R. 110].

Postmaster Martin identified all of the defendants. Vandergrift [R. 255], Wagner [R. 257] and Cambiano [R. 260].

Witness Robert Hunt identified Vandergrift [R. 228] but later conceded this to be a doubtful identification [R. 238]. He identified Cambiano as the driver of the Oldsmobile [R. 242].

Brief Account of Certain Other Witnesses.

Witness Francis L. Smongesky was called by the defense. He was a latent fingerprint expert from the Sheriff's Office [R. 381]. He was called to examine certain cars on the afternoon of December 19, 1955. He examined the Pontiac station wagon (the car driven by Postmaster Martin to the parking lot to the rear of the bank), his notes failed to reveal the lifting of any fingerprints from the station wagon [R. 385], although he said he did lift some fingerprints from it [R. 385-386].

Witness Smongesky testified that he checked a car at the Los Cerritos Municipal Court [R. 387-388] bearing license 2 U 72729. This was the so-called "get-away" Oldsmobile. That he found a partial print on its steering wheel and "left front door arm rest of the Oldsmobile. I guess that's it." That he endeavored to make a comparison with Exhibit "F" to those that he lifted from the Oldsmobile. Exhibit "F" being the fingerprints of defendant Wagner, Vandergrift and Cambiano. That the comparison ". . . was negative." Upon cross-examination, expert Smongesky stated that if the back of one's hand were to rub against a car or table it would leave no prints; that fingerprints are very fragile and easily destroyed [R. 392]. That he had examined the car, all of its surfaces, including the left rear door handle or device:

> Q. And you found on both of these handles, the outside and inside, not one single trace of fingerprints, isn't that true? A. That is true [R. 395].

Witness Smongesky further stated, that from his experience that if a handle had been recently used, a print would be there, unless a person had a glove on [R. 395]. He further stated that he examined the steering wheel thoroughly and in his opinion if a print had been placed there within the hour or prior and had not been removed he would anticipate finding some traces of fingerprints or parts thereof on the steering wheel [R. 397-398].

The witness Bertha Burk stated that she rented some property at 327 North Gower Street, in the Hollywood area, to Mrs. Cambiano and Mr. Cambiano in the fall of 1955. Witness Burk identified such persons [R. 320]. That they had given the names of Fred and Frieda Burnell. This testimony was admitted only as to Cambiano [R. 321].

Witness Estelline Woodward testified that she had rented an apartment located at 10644 Wilshire Boulevard, Apartment 5, in October, 1955, to the defendant Vandergrift [R. 317]. That Vandergrift and his son continued to occupy this apartment during the months of November and December, 1955 [R. 318]. This witness identified defendant Vandergrift [R. 319].

Grace Begando stated she was employed by the General Telephone Company. That such company maintained service in the year 1955 to 10644 Wilshire Boulevard (the address of defendant Vandergrift's then apartment). The witness produced records from this telephone company Exhibit 10 being an application for telephone service of November 1, 1955, at 10644 Wilshire Boulevard, phone number GR 7-4148, and Exhibit 11 a detailed statement of calls made from this number relevant to message unit calls, the date, time, number of message units and the number called. These were offered as to Vandergrift and Cambiano, not as to Wagner [R. 329-331]. The witness had testified that both of these records were kept in the regular course of business by the General Telephone Company. The witness then proceeded to examine the various calls made from Vandergrift's apartment to a Hollywood 30325 number as reflected on Exhibit 11. (This last number was Cambiano's number, of 327 North Gower.) Witness stated the first call noted, made to HO 3-0325 was of December 12, 1955. An examination of Exhibit 11, the phone message unit statement, will indicate that there was made from GR 7-4148 (Vandergrift's) to HO 3-0325 (Canbiano's) sixteen calls from December 12, 1955, to and including December 18, 1955. Four such calls were made on December 17, 1955, and three on December 18, 1955. The robbery was Decem-

ber 19, 1955. Witness Begando stated no record was kept of incoming calls unless they were collect calls, of which there would be a record if such were made [R. 333].

Witness Byron C. King appeared as a representative of the Pacific Telephone and Telegraph Co. [R. 324]. He produced Exhibits 9 and 9-A, *i.e.,* company records of a subscriber in the name of Fred Burnell, whose phone he stated was installed in the month on September, 1955, at the address indicated, and that the phone number was Hollywood 3-0325 [R. 326]. That this number was a "non-published" number, which meant the subscriber's name was not listed in any telephone directory, nor is it given out by the telephone company [R. 327].

The defense called Charles H. Purdom, an elderly man who conducted a barber shop across the street from the site of the robbery. He testified to seeing a fellow running across the street with a hat on who went up to the station wagon ". . . and opened the door and went to working in there with his hands" [R. 341]. That the men he saw had hats on and the one he saw had something over his face [R. 342]. He did not identify any of the defendants [R. 343]. Upon cross-examination, witness Purdom stated that if there was a man driving the car in which they went away he never saw him [R. 349]. That he never saw the face of the man that was coming toward him. That he would not attempt to identify that man [R. 350]. That he did not see the man sufficiently so he could have told anybody who he was [R. 351]. That two men came to see him from the Sheriff's Office the day after the robbery [R. 353]. He was questioned and answered as follows:

> "Q. (By Mr. Neukom): And didn't you tell Lt. Le Bas, in substance and effect, that you didn't see anything regarding the robbery, and that there

would be no need for them to make any notes as you had not seen anything about it, or words to that effect? A. Well, that is what I thought, that it didn't amount to enough as a witness. But other people sees different.

Q. Did you tell them substantially what I said? A. Yes, sir."

II.

No Errors Were Committed by the Entire Court's Order Refusing to Reveal the Names or Addresses of Jurors. Nor of the Trial Court's Ruling in Similar Respect. Nor of the Court's Ruling With Respect to Individual Examinations of Prospective Jurors.

It is submitted that no Constitutional right of the defendants was infringed upon by the general order of this district court filed February 28, 1951, with respect to jurors nor by the instant rulings of the trial court now complained of by appellants.

With the exception of capital cases such as treason and murder (18 U. S. C., Sec. 3432), we know of no rule or provision requiring the clerk or the court to divulge prior to trial the names of prospective jurors.

In fact, the law would seem to be that it is improper to make such divulgement. Prospective jurors should not be subject to neighborhood interview, etc. It is well established by reason of the Professional Ethics of the American Bar Association and by respectable authorities, that jurors should not be subjected to inquiry after they have arrived at their verdict. If it be the rule that jurors should not be harassed and investigated after the return of their verdict, all the more so should no investigation be conducted prior to their service. For a discussion and collec-

tion of authorities on the subject of the impropriety of investigating jurors, subsequent to verdict, see those collected and discussed by Judge Mathes in *United States v. Schneiderman,* 106 Fed. Supp. 906, 925 (1952).

There is no violation of the Constitutional guaranty in the rule of this court in refusing to furnish information on prospective jurors. The Sixth Amendment guarantees in criminal cases:

> ". . . to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, . . ."

This does not require the providing of the names and addresses of prospective jurors. There is a presumption that jurors called are fair jurors and will decide a case upon the evidence and instructions of the court. Rule 23, Federal Rules of Criminal Procedure, makes no provision for the supplying of the names and addresses of prospective jurors.

The rule that applies is Rule 24(a) of the Federal Rules of Criminal Procedure. The rule has never, to our knowledge, been held to be unconstitutional.

Appellants have discussed this jury issue under their first four main "Points" or headings. We shall refer to such contentions under this one heading.

It is appellee's view that substantially all of such contentions here urged have been answered by a recent opinion of this court, and one which is quite familiar to counsel for appellants. Such case is:

> *Hamer v. United States* (No. 15688),..... F. 2d ..... (Aug. 26, 1958), rehear. den.

We shall not repeat the arguments or authorities the government presented in its brief in the *Hamer* case, nor

here refer to the cases and comments of this court in the *Hamer* opinion. We submit these jury contentions on *Hamer.*

Further Discussion.

Reference by the appellant to 28 United States Code, Section 1864, as a guarantee of the right to know the names and addresses of jurors is not supported by the language of that statute. That section declares that the names of petit jurors shall be publicly drawn. It does not state that the names and addresses of prospective jurors are a matter of public record available to anyone. While the drawing of names is public, the names themselves are not public.

Appellants state (see App. Op. Br. pp. 34-35) that prior to 1946 jurors were selected in accordance with the usual and customary practice within the state, 28 United States Code, Section 411 (1946 Ed.).

In 1948, Congress enacted standard of qualifications for jurors in Federal courts, 28 United States Code, Section 1861. This section was later changed in September of 1957. Criminal cases in the Federal courts are governed and controlled by Federal statutes and Federal decisions and state decisions and statutes are inapplicable.

> *United States v. Schennault,* 201 F. 2d 1, 3 (C. A. 7, 1952), cert. den. 345 U. S. 950.

Rule 24(a) with reference to examination of prospective jurors makes it discretionary with the court to conduct *voir dire* examination itself or permit interrogation by counsel. A Federal rule of criminal procedure has the force of a statute and hence will abrogate a contrary principle of common law.

> *Rattley v. Irelan,* 197 F. 2d 585, 586 (C. A. D. C., 1952.)

Another interesting aspect is presented by Rule 57(b), Federal Rules of Criminal Procedure, which states:

> "If no procedure is specifically prescribed by rule, the Court may proceed in any lawful manner not inconsistent with these rules or with any applicable statute."

The Notes of the Advisory Committee on Rules, Note (b), states:

> "One of the purposes of this rule is to abrogate any existing requirement of conformity to State procedure on any point whatsoever."
>
> ". . . it semed best not . . . to prescribe a uniform practice as to some matters of detail, but to leave the individual courts free to regulate them either by local rules or usage. Among such matters are the mode of impaneling a jury . . ."

III.

The Evidence Was Fully Sufficient to Support the Verdict.

Commencing at page 36 of Appellants' Opening Brief, the evidence is challenged as insufficient. At a later part of this brief under our heading number IX, where we discussed the propriety of the court denial of a judgment of acquittal, we have referred to the evidence and its sufficiency.

A familiar principle followed by reviewing courts is that appellate courts will consider the evidence most favorable to the prosecution in determining whether the evidence is sufficient to sustain a conviction. Matters of identity, any conflict, alibis, absence of corroboration, length of time elapsing for an observation of appellants, and even lack of fingerprints in the get-away car, are all jury questions.

The appellate court must assume the jury resolved all conflicts in favor of the appellee and must assume the evidence proved all facts which it reasonably tended to prove.

Barone v. United States, 205 F. 2d 909, 912 (C. A. 8, 1953);

Finnegan v. United States, 204 F. 2d 105, 114 (C. A. 8, 1953).

Cases following this well established rule that the credibility of witnesses and the weight of the evidence are to be determined by the trier of facts are legion, to note but a few:

Goldman v. United States, 245 U. S. 474, 477 (1918);

Gage v. United States, 167 F. 2d 122, 124 (C. A. 9, 1948);

Pasadena Research Lab. v. United States, 169 F. 2d 375, 380 (C. A. 9, 1948);

United States v. Socony Vacuum Oil Co., Inc., 310 U. S. 150, 254 (C. A. 7).

Glasser v. United States, 315 U. S. 60, 80 (C. A. 7) as follows:

> "It is not for us to weigh the evidence or to determine the credibility of witnesses. The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the government, to support it. United States v. Manton, 107 F. 2d 834, 839, and cases cited."

We submit that the evidence which the jury believed not only amply supports, but in fact compels the verdict which the jury returned. The rule as stated in this Circuit is

noted in *Stillman v. United States,* 177 F. 2d 607 (C. A. 9, 1949) at 616:

> ". . . The jury weighed the evidence and accepted it as true beyond a reasonable doubt, and since it is supported by sufficient evidence, the verdict binds us. *Hemphill v. United States,* 120 F. 2d 115 (C. A. 9), cer. den. 314 U. S. 627, 62 S. Ct. 111, 86 L. Ed. 503; *Henderson v. United States,* 143 F. 2d 681 (C. A. 9)."

The identity must be so weak as to constitute practically no evidence at all to entitle a reviewing court to set aside a jury's verdict. *People v. Braun,* 92 P. 2d 402, 404, 14 Cal. 2d 1. The *Braun* case was for the offense of robbery.

Puts His Life in Jeopardy by the Use of a Dangerous Weapon.

Appellants argue that something more must be established besides the occurrence of the robbery with the use of guns to come within the language of the statute which increases the offense, *i.e.,* ". . . or puts his life in jeopardy by the use of a dangerous weapon, . . ." (18 U. S. C., Sec. 2114). The evidence is clear in this case that both Wagner and Vandergrift were armed with guns, loaded or otherwise is not material. The argument appellants advance is most tenuous. Surely they do not assert that a shot must first be fired or the guns used by striking a blow before this phase of the statute would apply. "Put in jeopardy" could hardly have been intended by Congress to require some physical attack, a pulled trigger, a smashed head. We must be realistic and practical. Robbery is no new crime.

This case was tried under the authority of the *Madigan* case, *infra,* and cases therein cited. In *Madigan,* the then Federal statute contained the same clause ". . . or puts his life in jeopardy by the use of a dangerous weapon, . . ." The California law pertaining to robbery, and what constitutes a dangerous weapon was also presented in the instant case.

In *Madigan v. United States,* 23 F. 2d 180, 182 (C. A. 8, 1927) the court quoted from instructions given in previous Federal robbery cases (p. 182):

> " 'If, therefore, you shall believe that a robbery of the mail has been committed by the prisoner; and that in effecting if he has done such acts as created in the mind of the driver a well grounded apprehension of danger to his life, in case of resistance or refusing to give up the mail; if his life was actually in danger, or he really believed it to be so, then the robbery was committed by putting his life in jeopardy." '

The appellate court then continued:

> "This principle was restated by Judge Maxey in charging the jury in United States v. Reeves (C. C.) 38 F. 404. We are impressed with the soundness of this construction of the statute. The trial court took this view of the law and instructed the jury:
>
> " 'Putting the life of a custodian of the mail in jeopardy is effected when a demand for submission and surrender of the mail is made of the person in charge thereof with a show of weapons calculated to take his life, such as pistols, thereby putting him in fear of his life.' "

It is well settled by California law as well as by Federal law that a person may be convicted of robbery with deadly weapons, when weapons were used by the actual robbers

though one of the accused was not present at the actual robbery.

Murray v. United States, 10 F. 2d 409, 411 (C. A. 7, 1925);

18 U. S. C., Sec. 2.

To like effect pertaining to mail robbery:

O'Brien v. United States, 25 F. 2d 90, 91 (C. A. 7, 1928);

Colbeck v. United States, 10 F. 2d 401, 403 (C. A. 7, 1926).

If a confederate may be found guilty of robbery with deadly weapons when not actually at the scene of the robbery, by what reasoning can it be argued that "put in jeopardy" means some kind of physical attack?

The Donovan Case.

Appellants have in their brief upon three occasions referred to the mail robbery case of *United States v. Donovan,* 242 F. 2d 61 (C. A. 2, 1957). In the opinion the court reviews the older cases brought under this or similar sections and concludes that "jeopardy" means danger not fear. That is precisely the way the trial judge so instructed in the instant case. Note the instruction given in this case.

> "Putting the life of a custodian of government money and property in jeopardy is effected when the accused or either of them has done such acts as has created in the mind of the postal official a well grounded apprehension of *danger to his life,* in case . . ." [R. 673]. (Emphasis added.)

The court was careful to explain that if the defendants are not guilty of robbery then it would be unnecessary to

find on the issue of the use of a dangerous weapon [R. 673]. At no point did he instruct as to fear—rather as to "danger to his life."

In *Donovan* the court refers to *Madigan & Reeves,* other mail robbery cases, with no apparent effort to criticize such authorities. *Donovan* is not adverse to the instant case; it affirmed the conviction with an observation by the appellate court that the sentence of 25 years was not mandatory and that the Probation Act could apply and a suspended sentence could be imposed on Count 2. The case was remanded for such reconsideration. In *Donovan* it is stated at page 64:

> "Moreover, on this record there appears to be no doubt of the actuality of the danger to the postal employee's life."

IV.

No Error Was Committed in the Court's Denial of a Bill of Particulars, Requesting the Names and Addresses of Government's Proposed Witnesses.

This subject particularly with reference to the "7-up" man is discussed commencing at page 40 of Appellants' Brief. To fairly consider this contention, attention is invited to the fact that this case was a re-trial of a previous trial that resulted in the jury failing to agree. The first trial commenced on July 31, 1956, and concluded on or about August 6, 1956. This trial—the subject of this appeal commenced on January 8, 1957, concluding with the verdict of guilt of January 16, 1957 [Clk. Tr. p. 49].

This we mention because not only was the "7-up" man, Mr. Hall, equally as accessible to the defense as to the prosecution but moreover his existence was made known to the defense in the former trial nearly five months before

the trial of the instant case. It is true that the transcript of the instant proceedings does not reflect such information, but if contested the Reporter's Transcript of the first trial will clearly show the existence of such a person—a driver of a "7-up" delivery truck whose whereabouts could surely have been found by the defense had they deemed his information of importance.

We hesitate to go out of the record of the instant case, however, during the former trial testimony concerning this so-called "7-up" man was referred to upon at least three occasions. Mr. James N. Bonner while testifying at the former trial described the truck driver—"but I think he had a shirt with 7-up on the back of it,"—The witness Mr. Hunt at the former trial also referred to seeing the parked "7-up" truck. The postmaster Mr. Martin at the former trial, with reference to the "7-up" truck testified that the driver of such truck was a "Mr. Hall" but that he only knew his last name.

It is thus apparent that the existence of the "7-up" truck driver was well known to the defense prior to the re-trial of this case, the subject of this appeal. Had the defense desired him, he could have been located.

Equally Available.

It is the position of the appellee that the "7-up" man was equally available to the defense; if so no inference should be drawn from the failure of the government to produce such a witness. No showing was made to the trial court that this person was peculiarly within the power of the appellee to produce and that the defense could not have found him if they had desired his presence. This is not the case of a special employee of the government not being called where the informer's presence was a natural

part of the government's case such as the situation presented in a case cited by appellants on page 42-a of their Opening Brief.

> *United States v. Jackson,* 257 F. 2d 41 (C. A. 3, 1958).

With reference to a failure to call the special employee the court observes on page 44 of the *Jackson* case:

> "His presence was a natural part of the Government's case and certainly he was not the kind of a witness that the defendant could be expected to call. We think that clearly his absence was a subject of proper and vigorous comment on the part of defense counsel."

In the *Jackson* case a prosecutor's objection to counsel for the defense comment upon the fact that the government did not call a certain witness was sustained by the trial court.

Not so here. Mr. Lavine, counsel for appellant Wagner developed the subject of the "7-up" man's absence without any objection by the prosecution, among other things, and freely and fully he argued to the jury [R. 611]:

> "Now, there is one missing witness here. The burden is on the Government to produce and prove its case. It is not on the part of the defense. There was a 7-up man there, a man who sat on the truck, a man who gave Mr. Bonner an automobile number which the Government now contends was the number of the automobile which they call the 'get-away car' and which Mr. Bonner says was the number that he didn't take and the number that he passed on to the officers.
>
> "Where is that 7-up man? Have you seen him? Why wasn't he here? The defense doesn't have to disprove our case. It is for the Government to prove

it. And I think it is significant that the United States didn't produce this 7-up driver as a witness. There has been no explanation as to why he wasn't here. It was up to them to maintain their burden of proof, and when they don't produce such a witness, it is presumed that his testimony would be against the Government.

"And I submit that when they didn't produce that 7-up man to come in here, his testimony would have been unfavorable to the Government, or they would have had him here. And so we have a hiatus in their proof."

Surely appellants must observe the distinction between this trial and that noted in the *Jackson* opinion.

A co-counsel for the defense, Mr. Ernest L. Graves, likewise referred to the absence of the "7-up" driver [R. 628]:

"But we don't have the 7-up driver, the one man who got the license. He is not brought in by the Government. And his evidence must be presumed to be against the Government. It must be presumed to be against it."

But that was not all; another co-counsel likewise referred to the absence of the "7-up" man, without a word of objection from the prosecution. We refer to Attorney Al Matthews, counsel for the defendant Cambiano [R. 642]:

"And that brings us to the 7-up man, doesn't it? Now, a wise judge said, 'A witness available to the prosecution to maintain the burden of proof which it does not produce or explain why it cannot, is presumed one who would testify against the Government. And the 7-up people aren't out of business yet that I known of."

The Rule That Applies.

Under circumstances such as presented in this case, the correct rule is, that where a witness is *equally available* to both parties no inference should be drawn from the failure to produce such witness.

Shurman v. United States, 233 F. 2d 272, 275 (C. A. 5, 1956);

United States v. La Rocca, 224 F. 2d 859 (C. A. 2, 1955);

McClanahan v. United States, 230 F. 2d 919, 925 (C. A. 5, 1956);

Wigmore on Evidence 3d Ed., Sec. 288;

Cyc. of Fed. Proc., Vol. 12, 3d Ed., Sec. 48.292.

There should be some showing that the adverse party made an effort to suppress admissible and relevant information.

United States v. Brown, 236 F. 2d 403, 405 (C. A. 2, 1956).

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"The failure of the government to introduce additional witnesses who might be expected to have admissible and relevant information is something which the trier of fact may consider in weighing the evidence. 2 Wigmore, Evidence §285 (3d ed. 1940). An appellate court, however, may not, unless it is shown that evidence material to appellant's defense was suppressed. Morton v. United States, 79 U. S. App. D. C. 329, 147 F. 2d 28, certiorari denied, 324 U. S. 875, 65 S. Ct. 1015, 89 L. Ed. 1428. To do so would be to exceed the proper scope of review, which, as we have already stated, is limited to ascertaining whether the government has presented substantial evidence of every element of the crime."

The authorities cited by appellants, commencing at page 42 of their Opening Brief, are not adverse to the above observations. We have already discussed the *Jackson* case. The case of *United States v. Gordon,* 253 F. 2d 177, as we read it passes upon the insufficiency of the evidence, not upon the inference from failure to produce a witness equally available. The case of *Yaw v. United States,* 228 F. 2d 382 (C. A. 9, 1955) is not directly to point. This case refers to the failure of the prosecution to produce at trial a co-defendant who had plead guilty. The *Yaw* case does not turn upon *equal availability,* but rather upon an example of an important prosecution witness, available to the prosecution, who was also a party to the alleged offense, being not called. The "7-up" man of the instant case was no participant of this offense, at most he may or may not have witnessed events fully covered by other identifying witnesses. The case of *Smith v. United States,* 230 F. 2d 935 (C. A. 6, 1956), is not directly in point. It is true the court in *Smith* briefly refers to the failure of the government to call two witnesses (p. 940, *Smith, supra*). However, in *Smith* the controlling factors for the reversal came from the trial court's instructions with reference to leniency recommendations that the court would be glad to receive—plus reference to the penalty provided for by the relevant statute together with other errors of the instructions.

The Denial of the Names of Witnesses Sought by a Bill of Particulars Was Discretionary and Properly Denied.

It appears to be well established that the matter of granting a bill of particulars is one largely resting within the sound discretion of the trial court, especially as to evidentiary facts.

Stillman v. United States, 177 F. 2d 607 (C. A. 9);

Wong Tai v. United States, 273 U. S. 77, 82;

Nye and Nissen v. United States, 168 F. 2d 846, 851 (C. A. 9, 1949), Aff. 336 U. S. 613;

United States v. General Petroleum Corp., et al., 33 Fed. Supp. 95 (D. C. Cal., 1940).

Excepting in capital cases, *i.e.,* as provided for by 18 United States Code, Section 3432, it is not the function of a bill of particulars to compel the prosecution to disclose the names of its witnesses.

Wayne v. United States, 138 F. 2d 1 (C. A. 8, 1943), cert. den. 320 U. S. 800;

United States v. Brennan, 134 Fed. Supp. 42, at 52-53.

To similar effect regarding either the non-obligation to disclose the names of witnesses or a disclosure of the government's evidence in advance of trial.

United States v. Lavery, 161 Fed. Supp. 283, 287 (D. C. Pa., 1958);

United States v. Lebron, 222 F. 2d 531, 535 (C. A. 2, 1955);

Frederick v. United States, 163 F. 2d 536, 545 (C. A. 9, 1947);

Himmelfarb v. United States, 175 F. 2d 924 (C. A. 9, 1949).

V.

No Reversible Error Was Committed in the Admission or Exclusion of Evidence.

Appellants refer to the above subject commencing on page 42c of their brief.

A. The Telephone Records Reflecting Message Unit Calls From Vandergrifts Phone Number to Cambianos Were Relevant and Properly Admitted.

In our "Statement of the Case" we have related the testimony that Vandergrift lived in an apartment at 10644 Wilshire Boulevard prior and at the time of the robbery of December 19, 1955. That his phone number was GR 7-4148 (Witness Begando from General Telephone Company). That Cambiano resided during this period at 327 North Gower and that he and his wife had rented such place under the name of Burnell not Cambiano. That the phone number of this place (Cambiano's) was HO 3-0325 [R. 326]. That this was a "non published" number, which meant the subscriber's name was not listed in any telephone directory, nor given out by the telephone company [R. 327].

It was then revealed by Exhibit 11, a message unit detailed statement, that from the phone GR 7-4148 (Vandergrift's) to the phone HO 3-0325 (Cambiano's non-published number), starting with December 12, 1955 to and including December 18, 1955, sixteen calls had been made from GR 7-4148 to HO 3-0325. Four of such calls being made on December 17, 1955. Three on December 18, 1955. The robbery was on December 19, 1955. This evidence was clearly relevant as to Vandergrift and Cambiano. It tended to show association. It was not received as to Wagner.

In another robbery case prior association was permitted to be shown, even though such evidence showed the defendants had met in a reformatory. In such case it was held relevant to admit evidence of a telephone call to another telephone number, the number of one of the defendant's girl friend.

> *Bram v. United States,* 226 F. 2d 858, 863 (C. A. 8, 1955).

The existence of phone calls shortly prior to the robbery from one of the defendants' phones to another, a "non-published" number was pertinent as circumstantial evidence tending to show association and probabilities of planning leading to the robbery.

For further authorities wherein it was held competent to introduce records pertaining to long distance telephone calls, see *Blakslee v. United States,* 32 F. 2d 15, 17 (C. A. 1, 1929). In the *Blakslee* case evidence of a number of telephone calls listed in the name of some defendants to others within the period of the conspiracy was held proper, without identifying persons thus communicating, the court holding that strict identity of the persons speaking over the telephone was not necessary.

See also:

> *Duncan v. United States,* 197 F. 2d 935, 937 (C. A. 5, 1952).

Evidence that a certain call was put through was held proper as circumstantial evidence. Slips pertaining to telephone calls between certain numbers held relevant.

> *United States v. Radov,* 44 F. 2d 155, 157 (C. A. 3, 1930).

To similiar effect with regard to records pertaining to telephone calls.

People v. Vacarella, 61 Cal. App. 119, 123 (1923);

Brink v. United States, 60 F. 2d 231, 234 (C. A. 6, 1932).

B. No Error Was Committed in the Cross-Examination of the Defendant Wagner.

On page 44 of Appellants' Brief the contention is made that the cross-examination of the only defendant who took the stand went beyond the scope of the direct examination. No effort has there been made to illustrate just what cross-examination is complained of.

The inquiry as to where Wagner first met Mr. Vandergrift, *i.e.,* in the penitentiary was not heard by the jury [R. 478-479]. This was a bench discussion. The court refused to allow this inquiry although there is law supporting even such an inquiry. See *Bram, supra.* The cross-examination of Wagner was entirely proper. It was developed that he had known both Vandergrift and Cambiano prior to the robbery of December 19, 1955 [R. 480-481]. That he had met Cambiano in either August or September of 1955 [R. 482-483].

Since counsel for appellants has not seen fit to specify just what cross-examination they contend exceeded the scope of the direct, we do not deem it our duty to justify the cross-examination conducted. Wagner, on direct had denied any participation in the robbery, and he had also presented an alibi defense, attempting to have the jury believe he was in Los Angeles rather than at Bellflower, California. It was developed on cross-examination that Wagner had a friend in Bellflower, that he had frequently driven along Bellflower Boulevard prior to December 19,

1955. The entire cross-examination of the defendant Wagner was entirely proper.

The scope that is permitted of cross-examination of a defendant is well stated in *United States v. Lowe,* 234 F. 2d 919, 922 (C. A. 3, 1956):

> "The second reason why there was no error in the exploration of this subject is that it was cross-examination. When a defendant takes the stand in a criminal case he is subject to cross-examination as any other witness is. No authority needs to be cited for the proposition that one of the purposes of cross-examination is to test the credibility of the witness and, subject to the judge's control, that cross-examination may go rather far. The scope of direct examination poses no limitation in this respect. Here the cross-examination was very material in testing the credibility of the defendant. See *United States v. Pagano,* 2 Cir., 1955, 224 F. 2d 682, 685, certiorari denied 350 U. S. 884, 76 S. Ct. 137."

This court has stated in *Austin v. United States,* 4 F. 2d 774, 775 (C. A. 9, 1925):

> ". . . But it is not prejudicial error to admit testimony in rebuttal which should have been offered as part of the main case, unless the party against whom the testimony is admitted is denied the right to controvert or contradict it, and there was no denial of that right in this case."

As stated in *Raffel v. United States,* 271 U. S. 494 (1926) at 497:

> ". . . His waiver is not partial; having cast aside the cloak of immunity, he may not resume it at will, whenever cross examination may be inconvenient or embarrassing."

And as said in *Davis v. United States,* 229 F. 2d 181, 186 (C. A. 8, 1956):

> "Mr. Justice Sutherland, sitting as a Circuit Justice in the case of United States v. Manton, 2 Cir., 107 F. 2d 834, 845, said:
>
> "'* * * The office of cross examination is to test the truth of the statements of the witness made on direct; and to this end it may be exerted directly to break down the testimony in chief, to affect the credibility of the witness, or to show intent. The extent to which cross-examination upon collateral matters shall go is a matter peculiarly within the discretion of the trial judge. And his action will not be interfered with unless there has been upon his part a plain abuse of discretion. 3 Wharton's Criminal Evidence (11th Ed.) §1308. See Alford v. United States, 282 U. S. 687, 694, 51 S. Ct. 218, 75 L. Ed. 624.'"

The cross-examination was germane to the testimony brought out upon direct examination. The proper limit for fair cross-examination is a matter within the sound discretion of the trial court. A defendant who takes the stand may be cross-examined as fully as any other witness. *D'Aquino v. United States,* 192 F. 2d 338, 369 (C. A. 9, 1951), and many authorities therein cited, including *Powers v. United States,* 223 U. S. 303 at 315. This is the rule concerning matters pertinent to his examination in chief. The cross-examination in the *Powers* case, which was approved, brought out defendants working near a still. To similar effect, *Berra v. United States,* 221 F. 2d 590 at 594 and 597 (C. A. 8, 1955).

The extent to which the broad cross-examination of a defendant is allowed is noted in the case of *United States v. Buckner,* 108 F. 2d 921, 927 (C. A. 2, 1940).

To similar effect *re* cross-examination of a defendant: *Salerno v. United States,* 61 F. 2d 419, 424 (C. A. 8, 1932), where on page 424:

> "The right of cross-examination is not confined to the specific questions or details of the direct examination, but extends to the subject matter inquired about."

C. No Error Was Permitted in the Court Permitting the Government to Reopen Its Case and Produce the Testimony of Inspector Hudson.

The court permitted the government to reopen its case as noted [R. 547]:

The reopening of any case is subject to the sound discretion of the court.

See:

Cyc. of Fed. Proc., Vol. 12, 3d Ed., Sec. 48.135.

This circuit has held that it is discretionary with the court to permit the government to reopen, both after the defense and the government has rested.

See:

Lutch v. United States, 73 F. 2d 840 (C. A. 9, 1934);

Medina v. United States, 254 F. 2d 228, 230 (C. A. 9, 1958).

Also, like effect:

Gormely v. United States, 167 F. 2d 454, 459 (C. A. 4, 1948).

The question as to whether evidence shall be received in chief or rebuttal largely rests within the discretion of the trial court.

> *Labiosa v. Government of the Canal Zone,* 198 F. 2d 282 (C. A. 5, 1952) (reversed on other grounds).

This discretion to permit a reopening has been held proper even after the case has been argued and gone to the jury.

> *Jianole v. United States,* 299 Fed. 496, 500 (C. A. 8);

Also note:

> *Burke v. United States,* 58 F. 2d 739, 741 (C. A. 9).

If the defendants were harmed by Postal Inspector Hudson's testimony as to distance from the Federal Building to the scene of the robbery and the time it normally took to drive there and felt that his testimony was not sufficiently qualified, efforts should have been made for a continuance, otherwise it should be deemed as waived.

It is only error to admit testimony in rebuttal which should have been offered in the main case when the party against whom the testimony is admitted is denied the right to contravert or contradict it. No such denial was had in the instant case. See:

> *Austin v. United States,* 4 F. 2d 774, 775 (C. A. 9, 1955).

VI.

No Error Was Committed in Refusing the Admittance of Exhibit E, the So-called Police Record. Its Contents Were Freely Permitted and Used in the Cross-Examination of the Identifying Witnesses.

At this point counsel for appellee desires to digress in a gentle chiding of his friend Mr. Lavine, for not complying with the addition to Rule 18 of this Court's Rules, *i.e.* "2(f)." We find no appendix in Appellants' Opening Brief stating page references where this exhibit, defendants' E for identification, was offered or rejected as evidence.

This Exhibit E for identification purports to be Broadcast No. 8 of December 19, 1955 issued by the office of E. W. Biscailuz, Sheriff—containing information pertaining to a robbery—namely the robbery here in question—and further containing some descriptions of certain of the suspects.

No effort is made in this purported copy of the broadcast to reveal from what source the information it contained was obtained. Nor does the exhibit show or purport to show that the purported descriptions were within the personal knowledge and observation of the recording official or his subordinates. This exhibit of itself was clearly hearsay. All documents or records made in the regular course of business (28 U. S. C., Sec. 1732) are not necessarily admissible merely because they are such records.

This Exhibit E was first offered during the testimony of Police Officer Ward of the City of Los Angeles [R. 410]. It is noted that a Police Officer of the City of Los Angeles was attempting to qualify a document from the Sheriff's office. The court's observation respecting this document

on pages 411 and 412 of the record are sound. It isn't only a question of a foundation to show that it is a business record that is kept in the normal course of business. What the Sheriff's office may have broadcast is not necessarily relevant and material to the issues on trial in the instant case. The defense could not be bound by the contents of such a recorded broadcast. The document does not attempt to, nor indeed disclose the source of its information. It is indeed hearsay upon hearsay, with no attempted foundation to reveal from whom the information was procured. This document should not be used to impeach Bonner, Martin or Hunt, which of course was the purpose of its being offered. Moreover, as we shall soon reveal, the descriptions here contained were liberally utilized in endeavoring to show a conflict in the identifying witnesses' first account as compared to the actual appearances of the defendants. [Colloquy between court and counsel concerning this subject extends from R. 410 through R. 418.]

A police report of an accident based in part on what others had told reporting officer as well as personal observations was inadmissible.

> *Gencarella v. Fyfe,* 171 F. 2d 419, 421 (C. A. 1, 1948).

A report prepared and filed by soldier's commanding officer which was not the result of what he actually saw, but which contained data and conclusions that must have been given to him by a witness, was held to be inadmissible.

> *Caudill v. Victory Carriers,* 149 Fed. Supp. 11, 13 (D. C. Va., 1957).

This court has stated with reference to documents prepared by public officials pursuant to a duty imposed by law

or required by the nature of their offices to be admissible as proof of the facts therein stated subject to the qualifications noted in *Olender v. United States,* 210 F. 2d 795, 801 (C. A. 9, 1954).

Page 801:

> ". . . Thus this circuit and most of the other circuits which have passed on the question have held that the facts stated in the document must have been within the personal knowledge and observation of the recording official or his subordinates, and that reports based upon general investigations and upon information gleamed second hand from random sources must be excluded." (Citing many cases.)

See also:

Wigmore on Evidence, Sec. 1635 (3d Ed.), p. 531.

A statement which would be inadmissible as hearsay if oral is not made admissible by the fact that it has been written.

Randel v. State, 153 Tex. Crim. 282, 219 S. W. 2d 689;

Fite v. State, 158 Tex. Crim. 611, 259 S. W. 2d 198.

The *Fite* case, *supra,* dealt with a robbery charge. The defendant, as here, sought to show that the witness in reporting the robbery described the robber as red-headed whereas defendant's hair was black. The trial court excluded the officers "offense report" which showed a notation describing the suspect as having "dark red hair." The Court of Appeals concluded that such report was properly excluded. The *Fite* case is very similar to the instant case.

See also:

Wharton's Criminal Evidence, Vol. 1, 12th Ed., Sec. 250, p. 577;

Witkin, California Evidence, Secs. 290-291 (1958).

Government "Status Reports" would not be admissible as an official record, since it did not appear that they related to matters within the personal knowledge of the persons who made the records and as to which they could testify.

Yung Jin Teng v. Dulles, 229 F. 2d 244, 247 (C. A. 2, 1955).

Compare:

United States v. Grayson, 166 F. 2d 863, 869 (C. A. 2, 1948);

Hoffman v. Palmer, 129 F. 2d 976 (C. A. 2, 1952), aff. 318 U. S. 109;

Mullican v. United States, 252 F. 2d 398, 404 (C. A. 5, 1958);

Hartzog v. United States, 217 F. 2d 706, 708 (C. A. 4, 1954);

Owens v. United States, 174 F. 2d 469 (C. A. 5, 1949).

The Equivalent in Descriptions as to That Contained in the So-called Police Record Was Presented to the Jury Through Cross-Examination of Identifying Witnesses and Through Defense Witnesses.

It is to be observed that when Postmaster Martin was cross-examined, he was confronted with a description he had given to Deputy Sheriffs concerning age and height of one of the men [R. 286]; that he may have told one of the Deputy Sheriffs that one of the men had straight

brownish hair and the other man was described as between 40 and 45 years of age [R. 287-288]. An inspection of Exhibit E clearly reveals cross-examining counsel for the defense had obtained this description from such exhibit. He, Martin, testified to identifying the defendants at the police show-up on January 12th [R. 290].

Assistant Postmaster Bonner likewise was cross-examined as to descriptions he had given to Deputy Sheriffs concerning the suspects of the robbery—age—weight, complexion [R. 132-133]. This information was obviously from Exhibit E, the so-called Police Record. Again a description is given concerning Wagner [R. 134, 136] ". . . between 45 and 50 years old, between five-seven and five-eight, a thinnish looking face, wearing a brown checkered sportscoat." Compare this to Exhibit E. Cambiano was also described ". . . dark complexion, either Italian or Potuguese." Bonner was cross-examined as to what he may have told a newspaper reporter [R. 137]. He testified that the first time he positively identified Wagner was at the police show-up of January 12, 1956. Additional, such cross-examination with respect to a mask slipping down on one of the men is noted [R. 168].

Martin was also cross-examined as to descriptions he had given to the Sheriff's office [R. 299]. That at the police show-up he identified Vandergrift "except for the hair" [R. 300]. He described the driver of the car, Cambiano [R. 309]. Bonner refers to Wagner—the profile of his nose and lips [R. 194]. That this event was an unusual event in his life—that he had never been robbed before.

The defense likewise called officers from the Sheriff's office. Deputy Sheriff Le Bas was called by the defense, he testified to having interviewed Martin and Bonner

"later that evening" [R. 365]. Bonner had told him about the handkerchief slipping down on Wagner [R. 369-370]. That Bonner had told him he could positively identify Wagner because the handkerchief mask had slipped down momentarily to below the chin [R. 372]. Officer Tierman testified to his conversation directly after the robbery with Bonner [R. 423] including age given, the handkerchief slipping down [R. 424]. The description given of the other suspect—age, height, weight, color of hair [R. 425]. Again what Bonner had told him [R. 431]. The court was liberal in allowing the defense to secure from Deputy Sheriff Pyeatt the information he had secured from Bonner and Martin [R. 443-444], after which the court in sustaining a renewed objection to Exhibit E observed: "He has testified to what you were trying to get in" [R. 445].

Thus we see the equivalent to Exhibit E was secured by the defense. If error it be to have excluded this broadcast, it should be characterized as harmless.

Rule 52(a), Fed. Rules of Crim. Proc.

VII.

No Error Existed in the Denial of the Post Office Inspectors' Reports.

The facts of this case are not in line with *Jencks* (353 U. S. 657). *Jencks* dealt with *statements* made by undercover agents who testified they had made oral or written reports to the F.B.I. on the matters to which they had testified. The court held the denial of such statements for inspection to be error.

In the instant case so far as Assistant Postmaster Bonner is concerned, he stated he made no description of the men in his report to Washington [R. 14]. He did

state that he told the Postal Inspector that he described the man who held him up as a man between 40 to 45 years of age and five feet seven inches in height [R. 141, lines 1-6]. It is thus seen that any discrepancy in the actual description of this person Wagner was already presented to the jury who heard the testimony and saw Wagner. The jury no doubt resolved that there was no real conflict —rather the human quality of persons often unable to accurately describe a person they had seen but able to recognize the person when seen again.

We have already discussed under a previous heading how liberal the court was in allowing the utmost of examination of possible conflict in the descriptions both Bonner and Martin may have originally given to the various officers including those from the Sheriff's office, compare to what the jury observed to be the description of the defendants who sat in court during the trial. All that could be expected from the Reports was to show a possible conflict; this the court liberally permitted during the cross-examination including even information gleaned from the Sheriff's broadcast, Defendants' Exhibit E for identification only.

Postmaster Martin was asked if he made a report to Washington, to which he said:

"A. I made a report, yes, sir" [R. 292].

Counsel dropped such inquiry with that answer and nothing was asked as to the contents of such report.

All identifying witnesses had been on and off the stand when it was first demanded that the government produce for the defense's inspection the report made by the postal authorities to the United States Government in Washington [R. 417]. This demand was made while the defense

were putting on their case and the prosecution had rested some 82 Reporter's Transcript pages prior to this demand [R. 335, line 23]. No government witness was on the stand when this omnibus demand was made, no attempt had been made to illustrate that any of the identifying witness had made statements concerning identity that the defense might expect or hope to be included in such a formal postal report to Washington. *Jencks* had not as yet been born. The defense here relied upon *Gordon,* 344 U. S. 414. The *Gordon* case was not in point, it concerned a key witness admitting on cross-examination that he had given to government agents a written statement that conflicted with his testimony incriminating a defendant then on trial. Such is not the case here.

We are unable to locate in the record, and so far appellants have not so indicated in their opening brief, a foundation justifying statements a defense counsel urged at trial concerning what was contained in such an alleged reported as noted in the request [R. 417 *et seq.*].

Surely this is not parallel to *Jencks,* where on cross-examination of the government's witnesses it was there clearly developed that such witnesses had regularly made written reports to the F.B.I. Furthermore as we recall the record up to this point, the defense did not know, they may have surmised, that there was in fact any such report or reports in existence made by an investigating Postal Inspector. Postal Inspector Hudson had not as yet testified, nor had any other postal inspector testified. Postal Inspector Hudson did not testify until the day following the now so-called *Jencks* demand. Inspector Hudson was called as a rebuttal witness, commencing [R. 515] and again after the prosecution had been permitted to reopen its case [R. 542]. We are unble to find one word of inquiry made of Inspector Hudson con-

cerning any report, while he was cross-examined upon the above noted two occasions. If such inquiry was gone into surely the appellants should so indicate.

Indeed upon two occasions one of counsel for the defense suggested he would call Inspector Hudson for the purpose of laying a more exact foundation to the demand [R. 419 and 421]. Despite which we are unable to locate in the record where he, Inspector Hudson, was so called.

This court has discussed the application or non-application of *Jencks* to appeals from trials occurring prior to the *Jencks* opinion. One recalled to the writer is *Harris v. United States,* ..... F. 2d ..... (June 24, 1958), rehear. den. Nov. 6, 1958, ... F. 2d ..... See also: *Rios v. United States,* 256 F. 2d 173, 177 (C. A. 9, 1958).

The *Roviaro* case (353 U. S. 53) cited by appellants under this heading does not appear to be relevant. *Roviaro* dealt with the failure to disclose the identity of an informer in a narcotics case, where the charge viewed in connection with the evidence introduced at trial was so closely related to the informer as to make his identity and testimony highly material. No informer is involved in the instant case.

It is well known that the *Jencks* case gave rise to Congress enacting in 1957 a statute dealing with and defining "statements" of witnesses who had been called to testify. We refer to 18 U. S. C. 3500. Such statute would not contemplate the demand here made.

VIII.

No Reversible Error Occurred in the Giving or Refusal of Instructions.

Error asserted concerning instructions commences on page 51 of Appellants' Opening Brief. The instructions given are reflected in the Reporter's Transcript commencing at page 661 and ending at page 676.

It appears to be fundamental that a reviewing court is not required to go further with respect to the trial court's instructions than to determine from the whole instructions as to whether they properly submitted the cause to the jury. The charges are not to be considered in isolation, but from their entirety.

> *Herzog v. United States,* 235 F. 2d 664, 667 (C. A. 9, 1956);
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> *Taylor v. United States,* 142 F. 2d 808, 817 (C. A. 9, 1944), cert. den. 323 U. S. 723;
>
> *Samish v. United States,* 223 F. 2d 358 (C. A. 9, 1949);
>
> *Finn v. United States,* 219 F. 2d 894, 902 (C. A. 9, 1955), cert. den. 249 U. S. 906;
>
> *Las Vegas Merchants Plumbers Association v. United States,* 210 F. 2d 732, 749 (C. A. 9, 1954).

Tested by the principles above announced the instructions given and those refused constituted no error.

Complaint is leveled against Government's Proposed No. 4 [Clk. Tr. p. 27]. This was given. Complaint is now asserted that it improperly included the term "presumption" with respect to the guns being loaded. First, it is to be observed that this instruction said nothing with respect to an inference of guilt, it merely correctly in-

formed that in robbery cases the gun need not be loaded to consider if a gun or pistol is a dangerous weapon. This instruction was supported by the post office robbery case of *Madigan v. United States,* 23 F. 2d 180, 182 (C. A. 8, 1927). The Court observed at page 182:

> ". . . In considering the threatening use made of the fire-arms in pointing them at the custodian of the mails, he said it was not necessary that it be proved that the guns were charged, the presumption being that it was so until the contrary should be proved."

Robbery is an offense more generally prosecuted under state laws. The California cases are legion on the principle that the gun need not be loaded. *People v. Coleman,* 53 Cal. App. 2d 18, 127 P. 2d 309, 314 (a toy pistol); *People v. Ward,* 84 Cal. App. 2d 357, 190 P. 2d 972, 974 (a toy pistol, which victim believed to be a real gun); *People v. McKinney,* 111 Cal. App. 2d 690, 245 P. 2d 24 (use of a hammer to simulate a gun, the question as to it being a dangerous or deadly weapon presented a jury question); *People v. Raner,* 86 Cal. App. 2d 107, 194 P. 2d 37 (an unloaded gun).

It is true that under certain circumstances the use of the word presumption in place of inference has been frowned upon. The instructions in the case were carefully gone over in conference [R. 563-579]. When the court stated he planned to give Government's Proposed No. 4, no specific objection was then made by counsel to such instruction because it contained the term "presumption" [R. 564]. Had counsel then suggested the more appropriate word "inference," it is probable the Court's attention would have been alerted and "inference" would have replaced the word "presumption." No, Counsel did

not make such a specific objection until after this instruction had been given. This, if error we believe to be harmless error and not a justifiable ground for reversal.

An error in a charge does not require reversal unless rights of the accused have been substantially prejudiced. *United States v. Kushner,* 135 F. 2d 668, 674 (C. A. 2, 1943), cert. den. 320 U. S. 212. It has been held that the use of the word "presumption" in a charge was not improper when considered in light of the remaining charge. *United States v. Angelo,* 153 F. 2d 247 (C. A. 3, 1946).

In absence of a presumption created by statute, it is better practice to charge in criminal cases on permissive inferences that may be drawn from the evidence rather than in terms of presumptions, but every charge of a presumption other than that of innocence does not result in reversible error. *Bernstein v. United States.* 234 F. 2d 475, 486 (C. A. 5, 1956), cert. den. 352 U. S. 915.

With reference to an instruction containing a clause heretofore disapproved by this Circuit, this court nevertheless recently sustained a conviction where such clause was included. *Shaw v. United States,* 244 F. 2d 930, 938-939 (C. A. 9, 1957). In *Shaw* this Court observed (p. 939):

> "The instructions are not a magical formula, any deviation from which is necessarily fatal on appeal. The trial may be held to be unfair to a defendant when formalism is rigidly observed. But nothing requires this Court to release a defendant obviously guilty because there has been a deviation from a standard of absolute perfection, but where we can affirmatively say the defendant has suffered no harm thereby."

An instruction that a person is presumed to intend the natural consequences of his own act was held to be non-prejudicial where the court dealt at length with the necessary intent. *Bianchi v. United States,* 219 F. 2d 182, 194 (C. A. 8, 1955), cert. den. 349 U. S. 915.

In *United States v. Di Carlo,* 64 F. 2d 15 (C. A. 2, 1933), presumption rather than inference was employed, the Court stated (p. 17):

> "The judge in his charge spoke of the inference which the jury might draw because of possession of a stolen car, as a presumption of law. While this was not strictly correct, and the presumption, or, speaking more properly, the inference which might be indulged in, was one of fact, *we have no reason to suppose that the jury were misled as to their duties.* After employing the word 'presumption' somewhat inartificially, he charge them that the 'presumption of possession is to be taken into consideration with all the other evidence in the case,' that the evidence in the case was circumstantial, and that 'the circumstances must be consistent with guilt all the way through. It is a chain which must be equally strong in every link and therefore the circumstances must be such that you are able to say that the government has established the fact that the defendant committed this crime beyond reasonable doubt.' *We see nothing prejudicial in what was said."*

See also *United States v. Seeman,* 115 F. 2d 371, 374 (C. A. 2, 1940), for holding that use of word presumption did not mislead jury.

A defendant is entitled to a fair trial but not a perfect one. *Lutwak v. United States,* 344 U. S. 604 (1953).

We next refer to the defense's rejected instruction No. 1 [Clk. Tr. p. 14] and Defendants' No. 14 [Clk.

Tr. p. 22]. Both of these instructions were properly rejected, they are of an argumentative nature, matters to be handled by counsel in their address to the jury, not points of law to be given by the court. The trial court's comment with respect to both of these instructions was sound [R. 567]:

> "The Court: Frankly, I consider it a wrong instruction, like you have a similar instruction which is your No. 14. I consider it always improper, as a matter of fact, even for the defendant, because what you are doing is limiting the consideration of the jury, and it should not be limited. They take into consideration—you are telling them to consider certain things. The jury may consider all the evidence; not just certain things. It is improper to limit a jury's consideration."

Defendants' rejected Instruction No. 4 [Clk. Tr. p. 17] dealt with the alibi defense. The court gave a full and proper instruction which was substantially the same thing, except a little simpler [R. 669, lines 5-17]. The courts have repeatedly stated that it is not the exact words of a proffered instruction that must be given—the substance is sufficient. *Ehrlich v. United States,* 238 F. 2d 481, 484 (C. A. 5, 1956); *Kasper v. United States,* 225 F. 2d 275, 280 (C. A. 9, 1955); *Lemke v. United States,* 211 F. 2d 73, 76 (C. A. 9, 1954), cert. den. 347 U. S. 1013.

Defendants' proposed instruction No. 5 [Clk. Tr. p. 18] was properly refused. This instruction was suggested because the government did not call the "7-up" man as a witness. We have discussed this problem under another heading. See heading number IV of this brief. This person was equally as available for the defense as for the prosecution—no inference should be drawn from

the failure of the government to produce such witness. Three identifying witnesses were produced. The rejection of this instruction was proper.

Defendants' requested instruction No. 15 [Clk. Tr. p. 23] was properly rejected inasmuch as it was substantially covered by an instruction given [R. 571; 673, line 10, to 674, line 13].

IX.

No Error Was Committed in Denial of Defendants' Motion for Judgment of Acquittal.

On page 61 of Appellant's opening brief it is contended that the Court erred in denying their motions for judgment of acquittal at the close of the case. These motions are reflected in the Reporter's Transcript commencing at page 559, line 14.

Appellants assert that they had been tried before, which resulted in a hung jury and no new evidence was introduced at this retrial. It is difficult to follow such a premise as a justification for a judgment of acquittal. In the instant trial all defendants had been identified by eyewitnesses as participants in the robbery. Note the testimony of the Postmaster Martin, Assistant Postmaster Bonner and Witness Hunt. Such a situation presented a jury question, a question of fact, with credibility to be determined by the jury. The fact that no fingerprints were found in the car, as those of the appellants, does not establish their non use of the "get away" car. They were seen to have entered it and drive away in it. The logical inference is that they were adept at removing telltale fingerprints. The testimony is that Vangergrift and Wagner were both armed with guns when they robbed the postal officials of postal property.

In considering a motion for judgment of acquittal the governing rule is 29(a) of the Federal Rules of Criminal Procedure, Title 18. This Court has stated the rule to be applied when such a motion is made in *Elwert v. United States,* 231 F. 2d 928 (C. A. 9, 1956), as follows (p. 933):

> ". . . The trial judge must grant a motion for acquittal where the evidence of guilt is circumstantial only if, as a matter of law, reasonable minds as triers of fact must be in agreement that reasonable hypothesis other than guilt could be drawn from the evidence. If, under this test, the case was properly submitted to the jury, its decision will be final. Unlike the practice in some circuits, this court applies no special rule to review circumstantial evidence on appeal. As to circumstantial proof of intent see this court's in banc decision in McCoy v. United States, 9 Cir., 169 F. 2d 776, certiorari denied 1948, 335 U. S. 898."

The trial court was correct in its rulings and is fully supported by the evidence of the case and the governing law. When a motion for a judgment of acquittal is made, the law appears to be that the sole duty of the trial judge is to determine whether substantial evidence, taken in the light most favorable to the government, tends to show the defendant is guilty beyond a reasonable doubt. *Hemphill v. United States,* 120 F. 2d 115, 117 (C. A. 9, 1941), cert. den. 314 U. S. 627; *Gorin v. United States,* 111 F. 2d 712, 721 (C. A. 9, 1940), aff'd 312 U. S. 19; *Bell v. United States,* 251 F. 2d 490, 491 (C. A. 8, 1951).

No quantity of contradictory evidence will authorize the trial court to direct a verdict if there is sufficient

substantial evidence to take the case to the jury. *Ross v. United States,* 197 F. 2d 660, 665 (C. A. 6, 1952).

A case often quoted on this subject is *Curley v. United States,* 160 F. 2d 229, 232 (D. C. Cir., 1947), cert. den. 331 U. S. 837, it is stated on page 232:

> "The true rule, therefore, is that a trial judge, in passing upon a motion for directed verdict of acquittal, must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt."

And on page 237, the Court said:

> "If the evidence reasonably permits a verdict of acquittal or a verdict of guilt, the decision is for the jury to make. In such case, an appellate court cannot disturb the judgment of the jury."

It is difficult to see the relevancy of the cases cited by appellants under this subject. The *Stone* case, 223 F. 2d 23, a marihuana conviction, deals with the question as to whether there was sufficient proof of the offense to sustain the conviction, that is whether it occurred in the Western or Northern District of Texas. The case was remanded. The *Reamer* case, 229 F. 2d 884, it is true, concerns itself with identification during a robbery. The identification of the appellant was solely by his voice, page 885, ". . . There was no other clearly identifying testimony. . . ." The conviction in *Reamer* was based on voice alone.

In the instant case not only do we have visual identification plus that of voice but also by way of illustration Bonner referred to one of the assailants, the No. 2 man

or Wagner, by ". . . the profile of his nose and lips" [R. 194].

> "Q. All you remember is sort of a thinnish type face of a distinguishing profile? A. Yes" [R. 194].

Witness Martin gave a description of defendant Cambiano [R. 309]. Witness Hunt likewise identified Cambiano [R. 230] and describes him [R. 242, line 19; 243, line 16; 244, line 13; 247 and 250].

Martin had identified Vandergrift [R. 254-255] and again explained such identification at the police show up "except for the hair."

It is common knowledge that a person may lack the ability to accurately describe a person he has seen or be unable to draw an accurate sketch of such person—but may very well retain an indelible memory of such person or object—especially of an unusual event—and have the chord of recognition vividly recalled when once again confronted with such individual. Our brains work just that way and not infrequently. Such an incident as here witnessed imprints itself within a man's mind.

The law requires no more than direct and positive evidence such as here exists. *Malone v. United States,* 238 F. 2d 851, 852 (C. A. 6, 1956), a robbery case. As a follow up to the *Reamer* case cited by appellants and discussed above, see *Thompson v. United States,* 233 F. 2d 317 (C. A. 6, 1956). The codefendant of Reamer was convicted and the verdict sustained on appeal. The court noted, page 318:

> ". . . while the identification of Reamer was by voice alone unsupported by any other circumstance, the appellant was identified not only by voice but by his eyes by testimony of the bank cashier . . ."

Compare *re* sufficiency of identification:

People v. Thompson, 147 Cal. App. 2d 543, 305 P. 2d 274;

People v. Gardiner, 128 Cal. App. 2d 1, 274 P. 2d 908, 910.

Reliability of testimony as to identification is for the jury to determine. *People v. Walker,* 154 A. C. A. 175, 315 P. 2d 740, 743, 744. To entitle a reviewing court to set aside a jury's finding of guilt, the evidence of identity must be so weak as to constitute practically no evidence at all. *People v. Braun,* 14 Cal. 2d 1, 92 P. 2d 402, 404.

Conclusion.

It is respectfully submitted that the judgments of conviction herein being reviewed should be affirmed.

Respectfully submitted,

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